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ENDING IMPUNITY FOR THE CRIME OF AGGRESSION

*Benjamin B. Ferencz**

Jurisdiction of the International Criminal Court over the crime of aggression has been deferred for reasons that are not persuasive. Aggression has already been adequately defined. The UN Security Council and the International Criminal Court are linked by the existing ICC Statute adopted in Rome. Compromises already reflected in the Rome Statute will be difficult to revise by new amendments. Ambiguities are best resolved by ICC Judges. Nuremberg's condemnation of "the supreme international crime" should not be repudiated. The ICC must be enabled to deter aggressions by bringing transgressors to justice.

AGGRESSION HAS ALREADY BEEN ADEQUATELY DEFINED

A. *From Nuremberg in 1946 to Rome in 1998*

The International Military Tribunal at Nuremberg (IMT), composed of esteemed judges from the United Kingdom, France, the Soviet Union and the United States, acknowledged that ex post facto punishment was abhorrent to the law of all civilized nations. They observed that the general principles of justice should be respected but not followed blindly.

The tribunal was explicit that declaring aggression to be "the supreme international crime" was not an exercise of arbitrary power on the part of the victors, as has often been alleged, but the reflection of an evolutionary process that had evolved after countless millions of people had been killed in brutal warfare.¹ "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."² "This law is not static," said the Tribunal, "but by continual adaptation follows the needs of a changing world."³

* Chief Prosecutor, "Einsatzgruppen trial" at Nuremberg (1948). J.D., Harvard (1943).

¹ Tribute to Nuremberg Prosecutor Jackson, <http://www.benferencz.org/arts/79.html> (last visited Feb. 3, 2009).

² Trial of the Major War Crimes Before the International Military Tribunal Judgment (Oct. 1, 1946) [hereinafter IMT Judgment], reprinted in 41 Am. J. Int'l. L. 172, 217 (1947).

³ *Id.* at 219.

Article 6 of the Nuremberg Charter defined Crimes Against Peace as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”⁴ This broad definition was the basis for war crimes trials in Tokyo and elsewhere.⁵ The Nuremberg Charter and Judgment were adhered to by 19 more nations and unanimously affirmed by the first General Assembly of the United Nations.⁶ U.S. Supreme Court Justice Robert H. Jackson said, in his Opening Statement: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”⁷ Jackson made clear that if law is to serve a useful purpose “it must condemn aggressions by any other nations, including those who sit here now in judgment.”⁸

To help implement its plan for a criminal code to be enforced by an international criminal court, the U.N. General Assembly appointed Special Committees on the Question of Defining Aggression. The definition of aggression was reached by consensus as an integrated and indivisible package and approved by the General Assembly in 1974 as Resolution 3314. Agreement was made possible by a number of rather vague compromises and exculpatory clauses of such creative ambiguity that nations with opposing views could interpret its contradictions to support their own political objectives.⁹ The consensus definition began with a generic declaration that: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the U.N.”¹⁰ Obvious illustrations, such as invasion, military occupation, bombardment, blockade or attack were listed, but it was stipulated that the Security Council could determine that these *prima facie* indicators were not aggression and that other acts were aggression.¹¹ It was left to the Council to decide whether any act of a state was aggression or not.

⁴ *International Military Tribunal Charter art. 6(a)*, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

⁵ G.A. Res. 95, art. 1, U.N. Doc. A/RES/1/95 (11 Dec. 1946).

⁶ *Id.*; Benjamin Ferencz, *Law. Not War., The Nuremberg Trials*, <http://www.benferencz.org/arts/72.html> (last visited Feb. 8, 2009).

⁷ MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945–46: A DOCUMENTARY HISTORY* 81 (1997).

⁸ *Id.* at 85.

⁹ Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT'L L. & ECON. 701, 711 (1975).

¹⁰ G.A. Res. 3314 (XXIX), annex art. 1, U.N. Doc. A/9631 (Dec. 14, 1974).

¹¹ *Id.* arts. 2–4.

The International Law Commission (ILC), composed of independent experts from many countries, after extensive deliberation reached the conclusion that aggression was a customary law crime and “it should be left to practice to define the exact contours of the concept of crimes against peace . . . as identified in article 6 of the Charter of the Nurnberg Tribunal.”¹² The ILC also concluded that until an act of aggression by a State has taken place, no individual can be held accountable for the crime.¹³ “It would thus seem retrogressive to exclude individual criminal responsibility for aggression . . . 50 years after Nuremberg.”¹⁴ Those who argue for greater certainty fail to note that many valid criminal statutes contain vague phrases, such as “fair trial,” “due process,” and similar clauses that require judicial interpretation. Indeed, the Rome Statute itself limits its jurisdiction to “the most serious crimes of concern to the international community as a whole.”¹⁵ War crimes include “outrages against personal dignity.”¹⁶ Such nebulous descriptions have remained uncontested even though they would hardly qualify as models of legal precision. The argument that aggression can not be tried by the ICC because the crime has not been adequately defined is simply not persuasive.

B. Fiddling with Aggression in Rome in 1998

On July 17, 1998, in Rome, for the first time in human history, delegates from all over the world voted overwhelmingly to create an international criminal court. The crime of aggression was listed, in Article 5 (1), as one of the four core crimes, following genocide, crimes against humanity, and war crimes.¹⁷ But then a most unusual and unique temporary restriction blocked the court from exercising its jurisdiction over aggression. No other provision in the ICC Statute contained such restraints. Article 5 (2) provides:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise

¹² Int’l Law Comm’n, *Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996*, art. 8, ¶ 50, U.N. Doc. A/51/10 (1996) [hereinafter Int’l Law Comm’n 1996 Report].

¹³ *Id.* art. 8, ¶ 14.

¹⁴ Int’l Law Comm’n, *Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994*, art. 20, ¶ 6, U.N. Doc. A/49/10 (1994).

¹⁵ Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁶ *Id.* art. 8(2)(b)(xxi).

¹⁷ *Id.* art. 5.

jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.¹⁸

The creative last-minute compromise contained in Article 5(2) reflected the continuing tension between States that were still unwilling to surrender part of their sovereign right to wage war and the desire of weaker States that sought protection against aggressors behind the shield of an independent international court. An Annex to the Rome Statute stipulated that amendments could be taken up at a Review Conference, at least seven years later, to deal with “the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime . . . with a view to arriving at an acceptable provision on the crime of aggression for *inclusion* in this Statute.”¹⁹ In 2002, the ASP created a Special Working Group on the Crime of Aggression, open to all nations, to consider what should be done about the temporary suspension of jurisdiction over that vital offense. For years, Working Group members argued diligently and quibbled about the wording of a new definition. If agreement on an amendment can be reached, it would be a valued contribution, since it would end the unjustified allegations that the crime of aggression has not been defined.

The mandate referring to elements of the crime of aggression and the conditions under which the ICC could exercise its jurisdiction was rather puzzling since the General Principles of Criminal Law dealt with the elements in considerable detail.²⁰ Many delegates felt it would be better to leave well enough alone. Clarification of the elements is still to be considered.

Furthermore, the prescribed procedures for amendments were neither simple nor clear. An overwhelming majority of seven-eighths of the Parties might have to agree before any amendment would be legally effective. Some nations hoped that such high hurdles might be insurmountable. Prolonged debates about the meaning of various words or phrases could keep the crime of aggression in legal limbo forever. If stalemates could not be broken, potential aggressors would certainly not be deterred. Quite the contrary, tyrants and dictators would more likely be emboldened to flaunt their immunity by defiant acts of aggressive war.

¹⁸ *Id.* art 5(2).

¹⁹ Final Act of the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, Res. F(7), U.N. Doc. A/CONF.183/10 (June 15, 1998) [hereinafter Rome Statute Annex I] (emphasis added).

²⁰ See Rome Statute, *supra* note 15, arts. 22–33.

C. *The Bottom Line on the Definition*

Allowing aggression to be tried the same as the other three core crimes (genocide, crimes against humanity and war crimes) upholds respected decisions of the International Military Tribunals of Nuremberg, as affirmed by the UN General Assembly in 1946, the consensus definition of 1974, the recommendation of the esteemed International Law Commission experts and profound judicial determinations many years later. Many renowned scholars, such as Professors Cherif Bassiouni, Claus Kress, Antonio Cassese, William Schabas, and a host of other highly regarded authors, maintain that aggression is already a customary international crime that is subject to universal jurisdiction as a peremptory norm from which there can be no derogation.

The very distinguished British Law Lord Bingham of Cornhill, hit the nail on the head when he stated in a 2006 case: “the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.”²¹

It is the duty of the ICC judges to interpret the Statute and the applicable precedents and work papers—if and when the need arises. The eighteen members of the Court, elected to balance gender and different judicial systems, can be relied upon for a just interpretation of the law, precedents and commentaries. Indeed, the Rome Statute requires them to do so. If the judges feel that new amendments or clarifications are needed, they can make such proposals to the Assembly of States Parties (ASP). All that is required now is to remove the temporary restraints placed there by Article 5 (2). Accepted improvements are surely welcomed, but, after so many years of intense debate, it should be obvious that the crime of aggression has already been adequately discussed and improvements are not really necessary.

LINKS BETWEEN THE UNITED NATIONS AND THE COURT

A. *Security Council Powers under the U.N. Charter*

Many nations have recognized, in principle, that the International Criminal Court—the missing link in the world’s legal order—should be an independent juridical institution. Yet, the ICC cannot function in a political vacuum. When the United Nations was formed, after World War II, it was a political reality that the victorious allies were not prepared to give up their

²¹ R v. Jones [2006] UKHL 16, [19], available at <http://www.bailii.org/uk/cases/UKHL/2006/16.html>.

military power to any untried international body. They assumed the responsibility to maintain the peace but insisted upon a special right to veto any enforcement action;²² it was the price that had to be paid to bring the United Nations Organization into existence. Amendments to correct inequitable Charter provisions, as was promised in 1945, never materialized. Powerful states, primarily concerned with preserving their own power, hesitated to accept the idea that aggression was a punishable international crime. The world continues to pay dearly for such intransigence.

By the time the Rome Statute was adopted in July 1998, it contained several clauses to protect Security Council powers already vested in the UN Charter. It stipulated in Article 5 (2) that any amendment regarding the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations.”²³ Article 39 of the Charter directed the Security Council to determine the existence of any act of aggression and to decide upon measures to restore the peace.²⁴ Neither the ICC nor its Assembly of State Parties has any authority to alter or evade any U.N. Charter obligations. It was argued that the SC mandate was not exclusive and the U.N. Charter related only to acts of States and had nothing to do with individual criminal culpability. The International Law Commission, which included experts from powerful states, concluded that until an act of aggression by a State had occurred, no individual could be held accountable for the crime.²⁵ According to the ILC, conviction by the ICC was dependent upon a prior determination by the Security Council. You could not have one without the other. It must not be forgotten that the ICC has no enforcement powers of its own. For assistance in investigations or apprehension of defendants it depends upon cooperation from national states or support by the Security Council. Enforcement measures require concurring votes of all five Permanent Members (U.S., U.K., China, France and Russia) who, in effect, hold the reins of power. It was understandable that many States, fearing the politicization of the Security Council, were determined to uncouple the ICC from SC influence or control—if possible. The Special Working Group wrestled mightily for ways to by-pass the Council connection.²⁶ They considered turning to other bodies, such as the General Assembly or other international courts to decide whether a State has committed aggression. Each

²² Although the Security Council “veto power” is not explicit in the U.N. Charter, the fact that Security Council decisions on substantive matters require the concurring votes of all five permanent members implies such a power. See U.N. Charter art. 27(3).

²³ Rome Statute, *supra* note 15, art. 5(2).

²⁴ *Id.* art. 39.

²⁵ Int'l Law Comm'n 1996 Report, *supra* note 12, art. 8, ¶ 14.

²⁶ See International Criminal Court, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (Feb. 20, 2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-SWGCA-2%20English.pdf.

alternative option posed new problems. How other agencies or courts might react was complicated and unpredictable. The U.N. General Assembly would hardly qualify as an objective non-political forum. After considerable discussion about how to avoid abuse of the vested power of the Security Council, no generally-acceptable substitute was in sight. There was no advantage in trying to jump from the frying pan into the fire.

B. Security Council Powers Pursuant to the Rome Statute

In addition to restrictions that the pre-trial chamber and the rules of procedure place upon the Court, linkages between the ICC and the SC were integrated into the Statute in the hope that universal participation might be encouraged. The Court was given jurisdiction to accept situations referred by the Security Council. The Rome Statute also grants the Security Council the right to halt any ICC proceeding for renewable twelve month periods.²⁷ Thus, the SC controls a green light but also the red light to halt all ICC proceedings indefinitely. To be sure, the Council cannot intervene arbitrarily but only to preserve the peace “in conformity with the principles of justice and international law,”²⁸ Whether ICC judges will be able to consider whether the SC has acted in conformity with the UN Charter is uncertain but, the linkage between Council and Court has been firmly anchored in the Statute.

In addition, the ICC, under a principle of “complementarity,” must halt its proceedings and grant priority to any national court that is able and willing “genuinely” to try the accused.²⁹ Who decides whether a trial is “genuine” is unclear. Moreover, any State, whether a member of the Security Council or not, can divest the ICC of power by simply incorporating the Rome Statute into its own domestic legislation, thereby reserving for itself the right to try its own nationals in its own courts.³⁰

To placate those who were still not ready to accept ICC jurisdiction over the crime of aggression, the Rome Delegates finally agreed to a last minute saving compromise that led to protracted debates about what it really meant. The complicated and obtuse Article 121 seemed to say that in addition to the high hurdle of seven-eighths of the delegates generally having to agree on amendments, no State Party would be bound by an amendment on aggression unless it also specifically accepted the change by formal ratification.³¹ Many persons argued against a broad interpretation that undermined the basic purpose of the ICC. In the end, giving States the option not to be

²⁷ Rome Statute, *supra* note 15, art. 16.

²⁸ U.N. Charter art. 1, para. 1.

²⁹ Rome Statute, *supra* note 15, art. 17(1)(a).

³⁰ *Id.* art. 17(1)(a)–(b).

³¹ *Id.* art 121 (4)–(6).

bound was a price that had to be paid to gain acceptance in Rome from nations that were determined to retain the right to go to war. Thus, it came about that all State Parties, and probably non-Parties, were enabled to avoid ICC jurisdiction over the crime of aggression simply by doing nothing.

There is a delicate balance between Court and Council. It should be clear to members of the Security Council and their friends that no more protection is really needed than what they already possess in both the U.N. Charter and the Rome Statute itself.³² Nations that nevertheless insist on additional guarantees inevitably generate suspicion and hostility. On the other hand, forgoing new demands for more restraints on the ICC should earn appreciation and good will instead of fears and resentment. The SC could be seen as a partner of the ICC instead of an adversary—which is as it should be. The notion of a completely independent ICC is a mirage.

C. *Misguided Fears*

Despite assurances built into the U.N. Charter and the Rome Statute, some powerful States still hesitate to accept the jurisdiction of any new legal institutions to deter aggression. Outdated notions of national sovereignty in an interdependent world obscure the need for change. As long as the military may be required to act with armed force in situations which political leaders proclaim are purely defensive or humanitarian, commanding officers can hardly be expected to welcome the existence of any international court to test the legality of their military action. Their concerns are fully understandable but very short-sighted. There can be no doubt that the best way to protect the lives of those who serve in the armed forces, (as well as countless civilian victims,) is to deter the crime of aggressive war. The Allied Supreme Commander of World War Two, Dwight D. Eisenhower, after he became President of the United States, warned the nation that “the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.”³³ Eisenhower’s advice was repeated in the memoirs of General Douglas MacArthur, commander of forces in the Pacific, as well as very many others—past and present—who have experienced the indescribable horrors of warfare. For their own self-interest, all nations must try to stop glorifying war and turn instead to the rule of law.

It may be that the Council will not respond to a request from the Prosecutor for guidance whether an act of aggression has occurred. Even if the Council fails to live up to its Charter responsibilities, the indictment will serve a useful purpose. Aggressors should realize that there is a possibility

³² See Rome Statute, *supra* note 15, art. 16 (stating that although no ICC proceeding may commence or proceed for a period of twelve months following a Security Council resolution, the Security Council may renew its resolution).

³³ *President Calls Law Key to World Peace*, N.Y. TIMES, May 1, 1958, at 14.

of trial before the ICC. The deterrent effect, no matter how modest, is an improvement over the present immunity. Surely, something is better than nothing. Even if the aggression issue lies dormant on the Council shelf, the Prosecutor need not remain helpless. National leaders suspected of planning or committing the crime of aggression may simultaneously be charged with Crimes Against Humanity and War Crimes—which carry the same maximum sentence as aggression. There has never been a war without atrocities. ICC trials for crimes other than aggression do not require any prior permission from the Security Council. SC failure to react to aggression is bound to evoke public outrage. The court of public opinion, informed by new means of instantaneous worldwide communication, is a powerful force which cannot long be ignored or suppressed. The “shame factor” may be the most effective enforcement tool available to the ICC.³⁴

The UN Charter prohibits the use of armed force without Security Council approval. Violent disputes that seem irreconcilable are best resolved by a court of law competent to administer justice and hold lawbreakers to account. To be sure, there have been occasions where the Council was politically paralyzed and force was needed to save human lives. The rules for justified humanitarian intervention and the criteria for legitimacy are still in formative stages. Nevertheless, there is ample room in the existing ICC Statute to cope with illegal acts that might be morally justifiable. Inventing new legal terminology to evade criminality, such as calling it “soft law” or “illegal but legitimate” or a “responsibility to protect” can be a dangerous practice. The ICC Statute recognizes that there may be many valid moral reasons, including intent and knowledge, for limiting criminal responsibility or mitigating punishment.³⁵ The Prosecutor, subject to control of judges, can decide not to prosecute if it “would not serve the interests of justice.”³⁶ Judges can acquit and the SC has no say in the matter. Court sentences must “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”³⁷ The ICC recognizes that morality and law go hand in hand. The world legal order is jeopardized every time any nation, unilaterally or in coalitions, takes the law into its own hands.

³⁴ See Benjamin B. Ferencz, *Speaking Frankly about the Crime of Aggression: Reconciling Legitimate Concerns and Removing the Lock from the Courthouse Door*, May 10, 2008, <http://www.benferencz.org/arts/93b.html>.

³⁵ Rome Statute, *supra* note 15, arts. 30, 31.

³⁶ *Id.* art. 53(1)(c).

³⁷ *Id.* art. 78.

SUMMARY AND CONCLUSION

The mandate of the Rome Annex related primarily to the definition of aggression and the relationship between Court and Council. The more amendments that are offered for consideration at the Review Conference, the more difficult it will be to focus on "the supreme crime" of aggression. Many scholarly books and articles have been written by learned professors and others offering good suggestions on how to improve the ICC Statute.³⁸ Of course, any amendment that can gain the support of the ASP and remove the Article 5 (2) lock from the courthouse door should be embraced as a significant victory. The test is not whether a proposal is perfect, but rather with it can meet the high threshold of acceptability.

Failure to allow the ICC to punish aggression is a repudiation of Nuremberg and a step backward in the development of international criminal law. Acknowledging that the ICC and the Security Council are inevitably linked sacrifices nothing that has not already been conceded. What it gains is to enable the ICC to deter or bring to justice those leaders guilty of the crime of aggression. Prohibiting the ICC from exercising its jurisdiction is an indefinite guarantee of continuing immunity for future aggressors. The result is self-defeating and counter-productive since it produces just the opposite of what those who support the ICC hoped to achieve.

If agreement cannot be reached with respect to competing proposals, the only alternative available to fulfill the mandate to include aggression within the active jurisdiction of the Court would be simply to delete Paragraph (2) of Article 5.³⁹ Nothing more is needed.

Giving an international criminal tribunal effective jurisdiction over aggression, even if it seems remote today, would be an historical achievement of incalculable significance. Every legal step should be taken that might help deter nations from the incredible horrors of armed conflicts. Aggressors should not be granted a renewed license to wage illegal wars with impunity.

The most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. That great step forward in the evolution of international humanitarian law must not be discarded or allowed to wither. Insisting that wars cannot be prevented is a self-defeating prophecy of doom that repudiates the rule of law. Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.

³⁸ See, e.g., the works of M. Cherif Bassiouni, William Schabas, and Antonio Cassese.

³⁹ Under the Rules of Procedure, the President of the ASP can decide if a matter is substantive or procedural. See Rules 63 and 64. An argument can be made that removing a temporary suspension in Article 5(2) is procedural; hence only a simple majority is needed for adoption.